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No. 02-1205

In the Supreme Court of the United States

EDITH JONES, ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED,
Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY, A DELAWARE CORPORATION,
Respondent.

SCANNED
AUG 06 2003

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Does the four-year "catch-all" limitations period of 28 U.S.C. §1658 apply to new causes of action created by Public Law 102-166, 105 Stat. 1071, the Civil Rights Act of 1991, which were codified at 42 U.S.C. §1981(a) and (b)?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners are, EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, DOROTHY JEAN EPPS, ELLIS JACKSON, SR., ETHYL WILLIAMS, WILLIE MOORE, EDDIE MCGEE, JAMES NEVILS, JR., JOSEPH BEVILL, SR., MARY BECKUM, CLARENCE BOLDS, EDITH BOWLES, CURTIS BROWN, TOM GRIFFIN, MARGIE HARRIS, MAURICE HAYES, ALBERT JACKSON, VENNIE LAWSON, RAYMOND LEWIS, HELLEN HARRIS, DAVID ARMSTRONG, DONNA BENNETT, ALBERT WALKER, ROSE M. SMITH, JOSEPHINE LOVE, FLOYD POPE, ERNESTIN JAMISON, TOMMY MOORE, RECHINNA SHELTON, FRANK MORRIS, VIEEN LEE, ELMORE DOBSON, ROSIE SMITH JAMES STROUD, EUNICE SIMON, HAROLD SMITH, RICHARD MEBANE, CHARLES COLLIER, PHIL JAMES, LOTTIE SHELTON, EDGAR PATTON, ROBERT JACKSON, THLEMA TOWNSEND, LUTHER WARD, JUANITA WALKER, THELMA WESTBROOK, GERALDINE CRENSHAW, GLENDA BELL, FLOYD POPE, JOHN W. ADAMS, JAMES S. ADAMS, JAMES TATE, LUELLA BRADFORD, CHARLIE MAE GILREATH, ERTHA HAYNES, ANNIE WELLS, CATHERINE JAMES, MELVIN HAMILTON, WENDELL SHUMATE, JOHN GREGORY, CLEVELAND ROBERTSON, CHARLES HARRIS, EVELYYN FOSTER, DONALD GRUNDY, RONALD CARTER, OTIS MIXON, ROOSEVELT DIXON, HARVEY MORRIS, THELMA TOWNSEND, ALBERT T. WALKER, BRENDA WASHINGTON, PEARLIE BENNETT, MAURICE JACKSON, ALICE F. JONES SMITH, PATRICIA LUCCADO, EDITH J. BOWLES, MILDRED SADDER, EVELYN FOSTER, JUANITA

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Respondent

R.R. Donnelley is a corporation, which is publicly traded. Petitioners are unaware of any publicly traded company that owns ten (10%) percent or more of said corporation's stock. Respondent Donnelley was the defendant in the District Court and the Appellant in the Seventh Circuit Court of Appeals.

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The Seventh Circuit order denying the timely petition for rehearing and rehearing *en banc* is at J.A. 102. The Seventh Circuit opinion is reported at *Jones et al v. R.R. Donnelley* 305 F.3d 717 (7th Cir. 2002). (J.A. 77) The District Court opinion is reported at *Jones et. al. v. R.R. Donnelley*, 149 F.Supp.2d 459 (N.D.Il. 2001). (J.A. 22)

JURISDICTION

The opinion of the Seventh Circuit was decided on September 16, 2002. (J.A. 77) The Court of Appeals entered an order denying a timely petition for rehearing and rehearing *en banc* on November 21, 2002. (J.A. 102)

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Certiorari was granted on May 19, 2003. (J.A. 104)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

A. Public Law 102-166, 105 Stat. 1071 (Civil Rights Act of 1991, codified at 42 U.S.C. § 1981 (a) (b) and (c));

B. Revised Statutes § 1977 (42 U.S.C. § 1981, Civil Rights Act of 1866);

C. Public Law 101-650, § 313 (28 U.S.C. § 1658, Judicial Improvements Act of 1990, as amended).

Public Law 102-166, 105 Stat. 1071 (42 U.S.C. § 1981(a) and (b) of the Civil Rights Act of 1991) provides:

a. Sec. 101. Prohibition Against All Racial Discrimination In The Making And Enforcement Of Contracts.

b. Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended–

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections:

(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Revised Statutes § 1977 (42 U.S.C. § 1981; Civil Rights Act of 1866) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws

> and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Public Law 101-650 § 313 (28 U.S.C. § 1658, Judicial Improvements Act of 1990) which was enacted on December 1, 1990, contained only section (a) and was subsequently amended in July 2002 (Pub. L. 107-204) to add section (b), and provides:

> (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.
>
> (b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of–
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

STATEMENT OF THE CASE

This case was filed on November 25, 1996 as a nationwide class action alleging race discrimination under § 1981(b) of the Civil Rights Act of 1991. (J.A. Rel. Doc. E.

1) All of the Plaintiffs who remain in this lawsuit[1] were fired between November 25, 1992 and November 25, 1994. (J.A. 78) Under Illinois' two-year personal injury statute these plaintiffs would not have timely claims.[2] Their claims include discrimination in discharge, discrimination in employee status and racial harassment. (J.A. 79)

The discharge claims relate to the shutdown of Defendant's Chicago Manufacturing Division, (hereinafter, CMD) which took place during the period of January 1993 through early 1995. (J.A. Rel. Doc. E. 102, p.2) During that time period R.R. Donnelley terminated approximately 575 African-American employees from the CMD. (J.A. 14, ¶ 24) The data produced by Donnelley shows that 31% of all white employees were transferred to other divisions, while only 1.2% of the African-American employees were transferred. (J.A. 14, ¶ 24) In addition, Donnelley had a practice of using its African-American employees as "temporary" or "casual" employees to keep them from retaining the same benefits and job security as the white employees. (J.A. 12-13, ¶¶ 12-14) The average tenure of the "temporary" employee was almost 11 years and the temporary and casual employees were more than 94% African-American. (J.A. 12 ¶ 13) The remaining claims relate to the racial harassment that went unchecked at the CMD up to and including the time of the shutdown. (J.A. 78-79)

Defendant filed a motion for partial summary judgment against those Plaintiffs whose employment terminated prior to

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[1] Settlement was reached on behalf of the individuals and classes not affected by the statute of limitations issue (J.A. Rel. Doc. E. 294).

[2] 735 ILCS § 5/ 13-202.

November 26, 1994 (the two-year Illinois personal injury statute of limitations). (J.A. Rel. Doc. E. 10) Plaintiffs responded by asserting that their claim relied on §1981(b) of the 1991 Civil Rights Act and that the proper statute of limitations under the 1991 Civil Rights Act was four years instead of two because of Congress' passage of the Judicial Improvements Act (which provided for a four year catch-all statute of limitations for Acts of Congress enacted after December 1st, 1990). Plaintiffs made alternative arguments that equitable estoppel and equitable tolling should apply because Plaintiffs were not aware that race was being used as a criteria in the selection of employees for transfer to other Donnelley divisions. (J.A. Rel. Doc. E. 102)

The Honorable Ann Williams[3] denied Defendant's Motion for Summary Judgment, but did not reach the issue of the four-year statute of limitations because the Court found that Plaintiffs were entitled to argue both equitable tolling and equitable estoppel. (J.A. Rel. Doc. E. 149) After the District Court's ruling on the Plaintiffs' Class Certification Motion, the Honorable District Court Judge Matthew Kennelly entertained briefs on the question of the appropriate statute of limitations. (J.A. Rel. Doc. E. 201-235) After extensive briefings Judge Kennelly held that the statute of limitations for a claim under §1981(b) of the Civil Rights Act of 1991 is controlled by the "catch-all" statute of limitations codified at 28 U.S.C. §1658, (Judicial Improvements Act of 1990, as amended) and is thus four years. (J.A. 22) Because this cause of action was filed on November 25, 1996, the statute of

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[3] At the time Judge Williams was the District Court Judge assigned to the case. When Judge Williams was appointed to the Seventh Circuit the case was reassigned to the Hon. Matthew J. Kennelly.

limitations under Judge Kennelly's ruling reaches back to November 25, 1992. (J.A. 40) All claims in this lawsuit fall under the 1991 Civil Rights Act and are timely under the four-year statute.

Defendant sought certification to the Seventh Circuit on the question of the proper statute of limitations, which the District Court granted and the Seventh Circuit accepted. (J.A. 35, J.A. 45, J.A. 75) The Seventh Circuit reversed the decision of the District Court, holding that Congress intended to have §1658(a) apply only when Congress establishes a new cause of action and §1658 does not apply to statutes that have "roots in" or "otherwise reference" laws that preexist §1658. *Jones v. R.R. Donnelley*, 305 F.3d 717, 728 (7th Cir. 2002). (J.A. 96)

Plaintiffs therefore timely petitioned for rehearing and rehearing *en banc*, which was denied on November 21, 2002. (J.A. 102) A timely petition for a writ of certiorari was filed and this Court granted that petition on May 19, 2003. (J.A. 104)

SUMMARY OF ARGUMENT

Following years of complaints by the federal judiciary about the burden on the federal courts of dealing with state statutes of limitations in "borrowing" situations, Congress passed the Judicial Improvements Act of 1990, which provided a four-year statute of limitations for civil actions arising under an Act of Congress enacted after December 1, 1990. Plaintiffs filed this case on November 25, 1996 relying on § 1981(b) of the Civil Rights Act of 1991; a statute enacted almost a year after the Judicial Improvements Act of 1990 was passed. The events complained of by Plaintiffs were not viable causes of action until the 1991 Civil Rights Act was

enacted. For these reasons, the Plaintiffs are properly subject to the statute of limitations found in the Judicial Improvements Act. (J.A. Rel. Doc. E. 1) All of the Plaintiffs and class members that remain in this case have timely claims under the four-year statute of limitations found in §1658 but almost none of these same Plaintiffs and class members would be timely under Illinois' two-year personal injury statute.[4]

The plain language of the applicable section of §1658 supports Plaintiffs' argument, as the relevant part[5] of the statute is one sentence, which reads as follows: " (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. §1658(a).

Donnelley argued, and the Seventh Circuit agreed, that §1658 was ambiguous and susceptible to more than one interpretation. The Seventh Circuit held that Congress could not have *intended* §1658(a) to apply to causes of action that had roots in previous laws. That Court then went on to hold that §1658 would only apply to laws that "exclusively" arise from *new* acts of Congress that do not have "roots in" or

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[4] The equitable estoppel and equitable tolling ruling still applies to the claims of those Plaintiffs who did not know about the secret transfer of white employees at the time the transfers were taking place. Under that ruling extensive discovery would need to be conducted to determine which plaintiffs could benefit from that ruling and which would be dismissed as not being timely under the two-year statute.

[5] §1658 was amended in 2002 to alter the statute of limitations under the Sarbanes-Oxley Act. (Pub. L. 107-204)

"reference laws" that preexisted §1658. *Jones v. R.R. Donnelley*, 305 F.3d 717, 728 (7th Cir. 2002).

The argument that §1658 cannot be applied to statutes that have roots in or reference previous laws must fail because such an analysis ignores the plain language of the statute, the intent of Congress, and the way in which Congress enacts causes of action which is often by amendment. Such an analysis would render §1658 a virtual dead letter.

ARGUMENT

I. INTRODUCTION

The plain language of the Judicial Improvements Act of 1990, the intent of Congress in passing that Act, and the unfortunate consequences that would otherwise ensue show that the general four-year statute of limitations in the Judicial Improvements Act applies to actions brought under the Civil Rights Act of 1991. This Court has already held that §1981 of the 1991 Civil Rights Act could not be applied retroactively because it created an entirely new cause of action, conferring new rights that never before existed, as opposed to simply clarifying an existing law. *Rivers v. Roadway Express*, 511 U.S. 298, 311 (1994). Because the Civil Rights Act of 1991 was a new law, enacted almost a year after §1658, the same principle that governed *Rivers* governs this case, that is, "a principle which has always been held sacred in the United States that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively unless the language of the Act shall render such construction indispensable." *Reynolds v. M'Arthur*, 27 U.S. (2 Pet.) 417, 434 (1829) (Marshall, J.). As Plaintiffs' claims did not exist until Congress enacted the 1991 Civil Rights Act, the four-year statute of limitations found in the

Judicial Improvements Act of 1990 applies to their cause of action.

A. Under the Plain Language of §1658, the Four-Year Statute of Limitations Should Apply to Plaintiffs' Cause of Action and the Seventh Circuit Was Wrong to Insert Words Not Found in the Statute.

28 U.S.C. §1658 was enacted on December 1, 1990, as part of the Judicial Improvements Act of 1990. The original Act reads as follows: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than four years after the cause of action accrues."[6] 28 U.S.C. §1658.

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[6] §1658 was amended on July 30, 2002 to create an exception for certain new cause of action that arises under the Securities Exchange Act of 1934. The Act now reads:

> (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.
>
> (b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of-
>
> (1) 2 years after the discovery of the facts constituting the violation; or
> (2) 5 years after such violation.

This Court has long held that the plain language of a statute should be the stopping point in the analysis: "In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it." *Schooner Paulina's Cargo v. United States*, 11 U.S. 52, 60 (1812).

> "Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation." ... "When the language is plain, we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision."

U. S. v. Temple, 105 U.S. 97, 99 (1881) (cites omitted); *See also, Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990), citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "[I]f the intent of [a statute] is clear," then the plain meaning is conclusive and the analysis need proceed no further. *Norfolk & Western Ry. Co. v. American Train Dispatchers*, 499 U.S. 117, 128 (1991), *quoting, Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

The year after Congress passed the Judicial Improvements Act, Congress enacted Public Law 102-166, § 101, 105 Stat. 1071, which was codified at §1981 (a) (b) and (c) as part of the Civil Rights Act of 1991. Part of the purpose for enacting the 1991 Civil Rights Act was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination," (42 U.S.C. 1981, §3(4)),

following this Court's ruling in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) and other Supreme Court cases.[7] The 1991 Act not only increased liability but also established a new standard of conduct. *Rivers v. Roadway Express*, 511 U.S. 298, 304 (1994).

Plaintiffs filed their lawsuit under the 1991 Civil Rights Act, six years after the Judicial Improvements Act was passed by Congress. The District Court held that the four-year statute of limitations under §1658 of the Judicial Improvements Act unambiguously applied to Plaintiffs' claims under the 1991 Civil Rights Act and that despite court decisions to the contrary, §1658 was not susceptible to more than one reasonable interpretation. *Jones et.al. v. R.R. Donnelley*, 149 F. Supp.2d 459, 464 (N.D.Ill. 2001) "'Enact' means to make into law by authoritative act, Black's Law Dictionary 546 (7th Ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is 'enacted.'" *Id.* The Civil Rights Act of 1991 was plainly an enacted "Act of Congress", as Congress specifically used both words in the law's preamble, including using the phrase "be it enacted." *Id.* Additionally, there is no question that a "civil action" as used in §1658 is commenced by the filing of a complaint. (*See*, Fed. R. Civ. P. 2, 3)

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[7] In *Patterson*, this Court held that the words "to make" contracts limited §1981 to discrimination only in the formation of a contract not to problems that may later arise from the conditions of continuing employment. *Patterson v. McLean Credit Union*, 491 U.S. at 176-77. This deemed non-actionable post-contract claims of discrimination in the terms and conditions of employment, such as the claims that Plaintiffs raise in this case.

"Arising under" is a term of art that has been used by this Court and Congress since the framing of our Constitution.[8] By the time Congress enacted §1658, the phrase "arising under" had been used by Congress in hundreds of federal statutes and this Court has interpreted that language to mean that a claim arises under federal law if reliance on that law would be a proper part of a "well pleaded complaint". *Gully v. First National Bank of Meridian*, 299 U.S. 109, 112 (1936). That federal law "must be an element, and an essential one of the Plaintiff's cause of action." *Id.*

Perhaps the most important of the statutes using the phrase "arising under" is 28 U.S.C. § 1331, which confers on federal district courts original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Only a year ago this Court again relied on §1331 case law in construing a similarly worded provision of Title 28:

> Section 1338(a) uses the same operative language as 28 U.S.C. § 1331, the statute conferring federal-question jurisdiction, which gives the district courts "original jurisdiction of all civil actions *arising under* the Constitution, law, or treaties of the United States." (Emphasis added.) We said in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 808 (1988), that "[l]inguistic consistency" requires us to apply the same test to determine whether a case arises under § 1338(a) as under § 1331.

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[8] Article III of the Constitution extends the judicial power to "cases . . . arising under this Constitution, the laws of the United States, and treaties made . . . under their authority."

Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U.S. 826, 829-30 (2002).

> The use of the phrase "cases and controversies arising under" . . . is strong evidence that Congress intended to borrow the body of decisional law that has developed under 28 U.S.C.A. § 1331 and other grants of jurisdiction to the district courts over cases "arising under" various regulatory statutes. . . . The traditional meaning associated with these words could hardly have been overlooked.

Coastal States Mktg., Inc. v. New England Petroleum Corp., 604 F. 2d 179, 183 (2nd Cir. 1979).

Plaintiffs' complaint relies on the 1991 Civil Rights Act and §1981(b) is an essential element of Plaintiffs' cause of action. (J.A. 9) The remedies requested, compensatory and punitive damages and declaratory and injunctive relief, are all "sought pursuant to 42 U.S.C. subsection 1981(b)."[9] Every reference in the complaint to the 19th century civil rights act[10] is followed by the phrase "as amended by the 1991 Civil Rights Act (Section 1981(b))."[11] Without §1981(b) most, if not all, of Plaintiffs' claims would not have been actionable following this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

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[9] Second Amended Complaint (J.A. 10)

[10] The complaint mistakenly refers to the Civil Rights Act of 1871. The Act in question was adopted in 1866. (J.A. 10)

[11] Second Amended complaint (J.A. 10)

Despite the fact that Plaintiffs' well pleaded complaint clearly relies on §1981(b) of the Civil Rights Act of 1991 and that §1658 clearly states that the statute of limitations is four years, "unless otherwise provided by law", as to "a civil action arising under an Act of Congress enacted after the date of the enactment of this section", the Seventh Circuit has inserted into §1658 the phrase "without reference to preexisting law," (*Jones et.al. v. R.R. Donnelley*, 305 F.3d 717, 726 (7th Cir. 2002)) and thereby completely changed the intent of Congress and made §1658, in effect, a nullity.

The Seventh Circuit, in inserting the above language, held that the plain language of §1658 does not address the "eventuality when a cause of action arises under two different acts, one enacted before and one enacted after the effective date of §1658". *Id.* at 724. However, by 1990 the established meaning of "arising under" clearly encompassed actions which arose only in part from the law or laws in question and therefore the failure of Congress to include any such express limitation in §1658 can only have been deliberate. Instead of imposing any such limitation on the sweep of §1658, or inviting the courts to fashion additional limitations, Congress prefaced §1658 with the words "[e]xcept as otherwise provided *by law*." 28 U.S.C. §1658 (Emphasis added). Congress clearly contemplated that any exception to the four-year rule would be based on an express statutory provision.

Appellees also respectfully disagree with the Seventh Circuit's premise that Plaintiffs' claims fall under two Acts. They do not. Plaintiffs' cause of action falls under *one act*, the 1991 Civil Rights Act, and as this Court said in *Rivers*, the fact that the new act is framed "as a gloss on Sec. 1981's original make and enforce contract language" does not alter the fact that the 1991 law is a new law. *Rivers v. Roadway*

Express, 511 U.S. 298, 308 (1994). The Civil Rights Act of 1991 was clearly enacted after §1658 and until that Act Plaintiffs did not have a cause of action. Lastly, §1658, as amended in 2002, *does* address the situation of when a cause of action arises under two different acts, and the statute clearly shows that Acts of Congress enacted after December 1, 1990, which have their roots in pre-existing statutes, are subject to the four-year statute, unless specifically exempted.

This Court should reject the Seventh Circuit's decision that we ignore §1658 for all legislation passed after December 1, 1990, if that legislation has roots in or is otherwise dependent on, provisions of any Act that predates §1658. *Jones et.al. v. R.R. Donnelley*, 305 F.3d at 725 n.5. That interpretation requires us to ignore the plain language of §1658 and exclude amendments that create entirely new causes of action (like this one) and any new causes of action that refer or relate to previous Acts. Plaintiffs respectfully submit that such an interpretation is untenable. As this Court recognized in *Rivers*, "altering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes." *Rivers*, 511 U.S. at 308. Surely this Court does not want to be in the position of requiring Congress to pass completely new sections of the Code each time it enacts legislation in order to achieve the result Congress clearly stated in §1658.

In addition, this Court has already recognized the plain and unambiguous language of §1658 when it explained that "[t]he expectation [of borrowing limitations from state law] is reversed for statutes passed after December 1, 1990, the effective date of 28 U.S.C. §1658...which supplies a general, four-year limitations period for *any federal statute* subsequently enacted without one of its own." *North Star*

Steel Co. v. Thomas, 515 U.S. 29, 34 n.1 (1995) (Emphasis added).

Because the expectation of borrowing limitations are now reversed, both this Court and Congress require that before a state statute of limitations can be applied to a civil rights claim, there *must* be an examination of whether there is an applicable federal rule or statute. (*See*, *Wilson v. Garcia* 471 U.S. 261, 268-269 (1985); *Chardon v. Fumero Soto* 462 U.S. 650, 663 (1983) (Rehnquist, J., dissenting)("If there is any federal law 'adapted to the object' of the civil rights laws, 42 U.S.C. § 1988 commands that federal courts apply that law in civil rights actions."); *Young v. Sabbatine*, 142 F.3d 438 (6th Cir. 1998)(remanding case to lower court to consider whether §1658 required the application of the four-year statute of limitations to §1981 claims.)) Such an examination unequivocally shows that §1658 is the appropriate federal statute to be applied for claims under §1981 of the 1991 Civil Rights Act.

This Court has stated "time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."..."When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"..."[J]udicial inquiry into the applicability of [a statute] begins and ends with what [a statute] says and with what [statute] does not." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-4 (1992). In *Jones*, the District Court found that, "looking at the plain language of §1658, this seems to this Court to be an easy answer". *Jones et.al. v. R.R. Donnelley*, 149 F.Supp.2d 459, 462 (N.D.Ill. 2001).

B. The Intent of Congress in Passing §1658 Was to Simplify the Judiciary's Task in Determining Statutes of Limitation for Federal Laws, but the Seventh Circuit's Decision Thwarts That Intent by Creating a Complicated, Virtually Unworkable Rule.

Prior to the enactment of §1658 this Court expressed frustration with Congress' failure to enact statues of limitation with the statutes it passed and its failure to enact a uniform federal statutes of limitations. "The court is presented with this task [of determining the appropriate statute of limitations] because Congress has seen fit not to prescribe a specific statute of limitations to govern actions under most of the federal civil rights statutes, instead directing courts to apply state law if 'not inconsistent with federal law.'" *Burnett et.al. v. Grattan*, 468 U.S. 42, 56 (1984)(Rehnquist, J., O'Connor, J., concurring in judgment) Additionally, The Seventh Circuit and other lower courts expressed their desire that Congress enact federal limitation periods. "We join the growing number of commentators and courts who have called upon Congress to eliminate these complex cases, that do much to consume the time and energies of judges but that do little to advance the cause of justice, by enacting federal limitations periods for all federal causes of action." *Sentry Corp. v. Harris*, 802 F.2d 229, 246 (7th Cir. 1986); *see also, London v. Coopers & Lybrand*, 644 F.2d 811, 813 (9th Cir. 1981).

In response, Congress established the Federal Courts Study Committee, which issued a report critical of the practice of borrowing from state statutes. That committee recommended that Congress adopt uniform limitations periods for federal claims rather than "borrowing" the most analogous state law limitations period. The House Report explained the problems such borrowing had created:

> It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitations periods.

H.R. Rep. No. 101-734, p. 24 (1990), (*quoting* Fed. Courts Study Comm., Judicial Conference of the U.S., Report of the Federal Courts Study Committee, 93 (1990)).

Congress answered that call with the passage of 28 U.S.C. §1658 and although Congress only enacted §1658 prospectively, the statute clearly states that it applies to *all* Acts of Congress enacted after December 1, 1990. Under the Seventh Circuit's decision, however, the ameliorative function of §1658 has been replaced by a complex, virtually unworkable rule, forcing litigants to scour the legislative history of all new acts of Congress to determine if they are "really" new or if they have roots in or otherwise reference preexisting law.

The Seventh Circuit's expansive reading of an exception to §1658 means that many of the new statutes that have been created by Congress since 1990, and many of the new statutes that will be created in the decades ahead, will remain subject to the borrowing of state limitations rules which Congress thought it had ended in 1990. The Seventh Circuit has identified three different types of post-1990 claims to which, on its view, the four-year limitation period will not apply: (a) claims contained in laws which "amen[d] a statute existing before [December 1, 1990]", (b) claims that "reference . . . preexisting law", and (c) claims based on a post-1990 standard of conduct enforced through a pre-1990 "right to recovery." (J.A. 97-98) Much of the legislation Congress has

adopted since 1990 falls within one or more of these three categories.

It is unlikely that Congress contemplated that statutes enacted a decade or more after the adoption of §1658 would still be the subject to the very borrowing of state limitations periods which §1658 was adopted to end. Under the Seventh Circuit's decision the use of borrowed state limitations periods, with the very attendant problems that Congress sought to avoid, will continue into the indefinite future with regard to other new legislation.

C. This Court Held in *Rivers* That § 1981 of the 1991 Civil Rights Act Created an Entirely New Cause of Action and the Seventh Circuit's Decision Conflicts with That Holding.

As this Court has held, it is "emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); and in *Patterson* this Court determined *not* that §1981 should be narrowed despite its original intent, but rather that the 1866 statute was never meant to reach certain types of actions. *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77 (1989). As mentioned above, Congress enacted the Civil Rights Act of 1991 partly in response to this Court's *Patterson* decision. In the Civil Rights Act of 1991, Congress enlarged the category of conduct embraced by the old §1981 by inserting that section and adding two new subsections §1981 (b) and (c), so that the complete text of the new law now reads:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be

parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exaction's of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" *includes the making, performance, modification, and termination of contracts, and* the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981(a)(b) and (c). (Emphasis added)

Consistent with the *Patterson* decision, this Court recognized that §1981(b) created an entirely new cause of action in *Rivers v. Roadway Express*, 511 U.S. 298, 313-14 (1994), when this Court decided that the 1991 Civil Rights Act should not be applied retroactively. This Court found that the Act "enlarged the category of conduct that is subject to §1981 liability," *Id.* at 303, and that its statement of purposes, instead of referring to "restoring" preexisting rights, describes the Act's function as "expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.* at 308. Without the enactment of the Civil Rights Act of 1991, most if not all, of Plaintiffs' claims in this case would not have existed.

The Seventh Circuit's finding that §1981(b) is solely "definitional" (*Jones v. R.R. Donnelley*, 305 F.3d at 727) conflicts in principle with this Courts' decision in *Rivers* and undermines the breath and extent of the 1991 Civil Rights Act. When Congress enacted the Civil Rights Act of 1991, subsection (b) changed the very essence of the language codified as subsection (a). The fact that this Court found that the Civil Rights Act of 1991 was not retroactive showed unequivocally that the new law was not an explanation of an old act, but instead created new causes of action that were not cognizable under the pre-1991 version of the statute. *Rivers*, at 313. As mentioned above, this Court stated in *Rivers*, "the fact that Section 101 is framed as a gloss on Section 1981's original make and enforce contract language does not demonstrate an intent to apply the new definition to past acts." *Id.* at 308. If, as this Court has stated, we cannot apply the "new definition to past acts," how then can we apply the old definition to new acts?

Because this Court has already found that the 1991 Civil Rights Act could not be applied retroactively because it was a new law that established a new standard of conduct expanding the rights previously allowed under §1981, it must be subject to the plain language of §1658, which establishes a four-year statute of limitations for Acts of Congress enacted after December 1, 1990.

D. Contrary to the Seventh Circuit's Holding, the Legislative History Confirms That Congress Intended to Create a Default Federal Statute of Limitations for *All* Statutes Enacted after December 1, 1990 and the Seventh Circuit Should Not Have Substituted its Desire for Congress' Intent.

Even if this Court should find that the plain language of the statute is somehow ambiguous, the Seventh Circuit's decision is inconsistent with the legislative history of both §1658 and §1981(b). In a statement on the floor of the Senate, the sponsor of the Judicial Improvements Act quoted from the report of the Judicial Conference Of The United States, Report of The Federal Courts Study Committee 93 (1990) and expressed the desire of Congress to do away with the practice of borrowing statutes of limitations. 136 Cong. Rec. S17581 (1990).

There is nothing in the congressional history that even remotely suggests that Congress did not intend to subject *all* Acts of Congress enacted after December 1, 1990, to the legislation. Even the Title, which is "Time Limitations on the Commencement of Civil Actions Arising Under Acts of Congress," shows that Congress' intent was to set a statute of limitations for lawsuits filed under Acts of Congress enacted after the effective date of that Act. *Id.* Although the title of an Act cannot control the plain words in the body of the statute, it can help assist in removing ambiguities. (*See, U.S. v. Fisher*, 6 U.S. 358, 386 (1805): "where the intent is plain, nothing is left to construction. Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.")

Similarly, the Seventh Circuit's finding that the District Court's interpretation was contrary to the "dispositive" legislative history of the 1991 Civil Rights Act because of discussions in the congressional history regarding the fact that §1981 actions have longer statutes of limitations than Title VII claims, is not only incorrect, but ignores the clear intent of Congress to establish a federal uniform statute and do away with "borrowing" for all new acts of Congress. *Jones et.al. v. R.R. Donnelley*, 305 F.3d 717, 727 (7th Cir. 2002). The section of the sparse legislative history relied on by the Seventh Circuit does not suggest that Congress intended to override §1658, as it is nothing more than a few stray comments, (more than six months prior to the passage of the 1991 Civil Rights Act) discussing how the limitations under §1981 *had been* applied by the courts. The entire paragraph in question is set out below; the portion selectively quoted by the Seventh Circuit is italicized:

> Current law provides for a generally longer statute of limitations for claims of intentional discrimination based on race than for other forms of employment discrimination. Title VII provides that an employment discrimination claim must be filed within 180 days following the alleged unlawful employment practice (300 days if the charge is filed with a state or local agency). *But under 42 U.S.C. section 1981, which bars intentional race discrimination in employment as well as other contractual relations, victims have a longer period of time to commence suits. In the absence of an express limitations period in section 1981, courts applying the statute have looked to analogous state statutes of limitations. These statutes allow two or three years, and allow up to six years in some states.* Thus, under current law, women, religious minorities and members of other protected

> groups must file claims within 180 days while victims of intentional race discrimination may still commence suit under section 1981 long after the expiration of this period. This disparity serves no purpose.

H. R. Rep. No. 102-40(I) (1991).

Read in context, the three sentences relied on by the Court of Appeals have nothing whatsoever to do with the as yet not enacted §1981(b) claims, and assuredly do not purport to address whether state limitations rules "would . . . apply" to such claims. This "legislative history" that precedes the enactment of the 1991 Civil Rights Act by more than six months is not sufficient to overcome the clear language of the actual statute. If Congress had intended to override §1658, it would and must have done so expressly, as Congress did with the Sarbanes-Oxley Act, when Congress amended §1658 in 2002.

As evidenced by the amended §1658, Congress clearly understood that the uniform statute of limitations act *would* apply to new Acts of Congress that reference preexisting statutes, absent congressional action to the contrary. Congress recognized that claims under the Sarbanes-Oxley Act of 2002 (Pub. L. 107-204), which was an amendment to the Securities Exchange Act of 1934, would have been subject to the four-year statute under §1658, unless specifically excluded.

Additionally, the Seventh Circuit's policy pronouncements that the application of the four-year statute to §1981(b) claims would "threaten to disrupt the settled expectations of a great many parties" and would create confusion because "unsuspecting plaintiffs who have relied on established precedent" would find themselves barred from relief and

defendants would find themselves "faced with potential liability on claims they believed extinguished," although commendable for the concerns raised, they simply cannot overcome the express Congressional enactment. *Jones et.al. v. R.R. Donnelley*, 305 F.3d at 728, quoting *Zubi v. AT&T*, 219 F.3d 220, 224 (3rd Cir. 2000). As Justice Marshall said in *U.S. v. Fisher et al.*, 6 U.S. 358, 389 (1805):

> But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them, to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce.

The dissent in the Third Circuits' *Zubi* decision also noted that, in interpreting a statute, courts must seek to determine what Congress intended, and not what they believe is the best approach. "It is by now axiomatic that 'the judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations..." *Zubi v. AT&T*, 219 F.3d at 231. (Alito, J., dissenting)(citations omitted).

Finally, and contrary to the Seventh Circuit's supposition, there were no "settled expectations" for post contract relief prior to the 1991 Civil Rights Act because there was no cause of action under §1981 for those claims prior to that Act. Again, as the dissent noted in *Zubi* at 231:

Before the enactment of the Civil Rights Act of 1991, no employer in New Jersey could have had a settled expectation that an action for discriminatory discharge brought under § 1981 would be subject to the state's two year statute of limitation for personal injury actions, since prior to that time, §1981 did not authorize such an action at all. It was not until the 1991 Act that such an action was possible, and by that point §1658 had been enacted. ... the single, general statement cited by the majority cannot bear the weight of the majority's interpretation.

E. If the Seventh Circuit's Rationale Is Accepted, There Will Be a Free for All in the Courts as Litigants on Both Sides Scour the History of Each New Statute to Determine If it Has "Roots In" or "References" Old Law.

Although petitioners' question is limited to the application of § 1658 to 42 U.S.C. § 1981, this Court's interpretation of that question will be guiding on other areas of the law and other causes of action enacted after §1658. The consequences of the Seventh Circuit's holding will in effect nullify §1658 because, as stated above, nearly all Acts of Congress have "roots in" or "otherwise reference" preexisting law. Although the list of legislation with private rights of action which have "roots in" or which "otherwise reference" previous laws could go on *ad nauseum*, examples include the Telecommunications Act of 1996 (Pub. L. 104-104, codified at 47 U.S.C. § 160 *et seq*), the Uniform Services Employment and Reemployment Rights Act of 1994 ("USERRA") (38 U.S.C. § 4301 *et. seq.*), the Air Transportation Safety and System Stabilization Act (Pub. L. 107-42), the Prosecutorial Remedies and Other Tools to End the Exploitation of Children

Today ("PROTECT") Act (Pub. L. 108-21), the Religious Land Use and Institutionalized Persons Act of 2000 (Pub. L. 108-24), the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (42 U.S.C. § 669A), the Driver's Privacy Protection Act (18 U.S.C. § 2724), the Freedom of Access to Clinic Entrances Act of 1994 (18 U.S.C. § 248), and Pub.L. 104-134, § 101(c) (adding a cause of action for persons injured by hazardous or injurious devices placed on federal lands to 18 U.S.C. § 1864). The challenge would be to find a statute creating a private right of action enacted after December 1, 1990 that does not have its own statute of limitations and which does not in any way have "roots in" or "otherwise reference" prior laws.

Under the Seventh Circuit's rationale, when Congress decides, for example, to enact federal legislation under §5 of the 14th Amendment, even though the legislation would be new, it would not be considered a new cause of action because its roots are in the Constitution. Ironically, even §1658 has its roots in the Justice Act of 1985 and could ultimately be traced back to the Judiciary Act of 1789. Under the Seventh Circuit's interpretation, most Acts of Congress *enacted after* §1658, that create new causes of action, without their own statute of limitations would not partake of the four-year statute because their roots are found in the Constitution or Acts of Congress that preceded § 1658.

The controversy regarding the applicable statute of limitations has already arisen under the Telecommunications Act of 1996 (47 U.S.C. § 160) (*See*, *MCI Tel. Corp. v. Illinois Bell*, 1998 WL 156674 (N.D. Ill. Mar. 31, 1998); *E. Spire Communications Inc. v. Baca*; 2003 WL 21537806 (D.N.M., June 12, 2003); *Verizon Maryland v. RCN Telecom Service*, 232 F.Supp.2d 539 (2002)), and under USERRA, 38 U.S.C. § 4301 (*See*, *Rogers v. City of San Antonio*, 2003 WL

1566502 (W.D. Tex., Mar. 4, 2003) and *Akhdary v. City Of Chattanooga*, 2002 WL 32060140 (E.D. Tenn., May 22, 2002)), both of which have "roots in" or "otherwise reference" laws enacted prior to December 1st, 1990. Given the number of statutes that have been enacted since December 1990, and the number of statutes which will continue to be enacted, that do not have their own statute of limitations, it is only a matter of time before this same question will plague other legislation as well.

II. CONCLUSION

For the reasons set forth herein and for such other reasons as this Court deems just and appropriate, Plaintiffs ask this Court to reverse the Seventh Circuit's decision and find that the four-year statute of limitations set forth in 28 U.S.C. §1658 applies to all civil actions arising under Public Law 102-166 § 101, 105 Stat. 1071, which was codified at §1981 (a) (b) and (c) whether or not those causes of action are amendments, have roots in, or otherwise reference earlier or preexisting law, and for such other and further relief as this Court deems just.

Respectfully Submitted,

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